EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

In The (3)

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1 393

The State of Ohio,

Petitioner,

v.

Danny Allen Counts,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46, Rules of the Supreme Court of the United States, Respondent, Danny Allen Counts, moves this Court to proceed in forma pauperis. Respondent further moves this Supreme Court to appoint counsel to represent me in these proceedings. This Motion is supported by Affidavit annexed hereto. Respondent's Brief in Opposition to the Petition for Writ of Certiorari is filed simultaneously herewith.

Because Respondent is indigent, he is unable to pay the costs and expenses, and to give security for same, in these proceedings. Respondent

RECEIVED
JUL 31 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

has been found to be indigent in all proceedings hereinbelow and has had the benefit of court appointed counsel and waiver of all costs.

By Gary Dumm
Attorney for Respondent, Danny Allen Counts
206 South Court Street, P.O. Box 211
Circleville, Ohio 43113
(614) 477-2593

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1

The State Of Ohio,

Petitioner,

v.

Danny Allen Counts,

Respondent.

AFFIDAVIT

IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF OHIO
COUNTY OF PICKAWAY, SS:

I, Danny Allen Counts, being first duly sworn according to law, depose and say, in support of my Motions for leave to proceed without being required to prepay costs or fees and for Court appointed counsel, as follows:

1. I am a Respondent in the above-entitled case.

2. Because of my poverty, I am unable to pay costs of this cause.

3. I am unable to give security for same.

4. I am unable to afford legal counsel to represent me in these proceedings.

5. I believe I am entitled to appear, respond to and defend the Petition For Writ of Certiorari filed by the Petitioner, The State of Ohio.

6. The nature of this cause is briefly stated as follows: I was indicted, tried, convicted and sentenced by the Court of Common Pleas,

Pickaway County, Ohio upon charges of aggravated robbery, aggravated kidnapping and aggravated murder. Thereafter, the Court of Appeals for Pickaway County, Fourth Appellate District, Ohio, reversed the convictions for aggravated kidnapping and aggravated murder on the grounds that the trial Court admitted hearsay testimony of an extra- judicial statement by the Co-Defendant, without an opportunity to cross-examine and test the hearsay statement. The Court of Appeals held the admission of such evidence to violate the confrontation clause of the 6th Amendment to the U.S. Constitution. The Ohio Supreme Court denied a Motion for certification of the appeal by the State of Ohio. These proceedings were commenced by the State of Ohio seeking a Writ of Certiorari for review of the Ohio Court decisions. Pending the sentence for my conviction for robbery, I remain in the Ohio penitentiary.

7. Because of my poverty, the Trial Court appointed counsel to represent me and the Court of Appeals, Fourth Appellate District and the Supreme Court for the State of Ohio appointed counsel and waived costs.

8. Further, I am presently unemployed.

9. I have not received any income from business, profession or other form of self employment, or in the form of rent payments, interest, dividends or any other source in the past twelve (12) months.

10. I have no cash or checking or savings account.

11. I own no real estate, stocks, bonds, notes, automobiles or other valuable property.

12. I have no dependents.

13. I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for purjury.

14. Further, Affiant sayeth naught.

Danny Allen Counts
DANNY ALLEN COUNTS

Duly witnessed and sworn to before me, a notary public this 11th day of July, 1985.

Notary Public- State of Ohio
Lifetime Commission LIFETIME

Case No. 85-1

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF OHIO,

Petitioner,

V.

WILLIE EUGENE ADKINS

Respondent,

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

The original copy of this cover was illegible.

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Argument	1
Proposition of Law I.	3
WHERE A STATE COURT DECISION CAN BE SUSTAINED ON THE BASIS OF STATE LAW INDEPENDENT OF ANY FEDERAL QUESTION RAISED AND PASSED UPON IN THE CASE, THE SUPREME COURT WILL EITHER DENY ITS JURISDICTION TO REVIEW OR DISMISS THE CASE.	
Proposition of Law II.	3
THE FAILURE OF THE PETITIONER TO ADEQUATELY PRESENT AND BRIEF AN ISSUE BEFORE THE OHIO SUPREME COURT WAIVES THE CONSIDERATION OF THAT ISSUE BEFORE THE U.S. SUPREME COURT UPON A WRIT OF CERTIORARI.	
Proposition of Law III.	4
THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION ENTITLES THE ACCUSED IN ALL CRIMINAL PROSECUTIONS TO BE CONFRONTED BY THE WITNESSES AGAINST HIM AND IS VIOLATED BY ADMISSION OF THE EXTRA-JUDICIAL STATEMENTS OF ANOTHER NOT TESTIFYING AT THE TRIAL AND NOT EVIDENCING SUBSTANTIAL INDICIA OF TRUSTWORTHINESS.	
Proposition of Law IV.	12
WHERE THE PROSECUTION'S SOLE DIRECT EVIDENCE CONTRAVERTING THE DEFENDANT'S TESTIMONY IS AN INADMISSIBLE EXTRA-JUDICIAL STATEMENT OF A CO-DEFENDANT, THE ERROR CANNOT BE DEEMED HARMLESS AS A MATTER OF LAW.	
Conclusion	13
Appendix	
Partial Transcript of Hearing	A1
Partial Transcript of Trial	A10

TABLE OF AUTHORITIES

CASE	PAGE
Ashwand vs. TVA, 297 U.S. 288 (1936)	3
Barbara vs. Page, 390 U.S. 719 (1968)	4
Bruton vs. U.S., 391 U.S. 121 (1968)	5
Chapman vs. California, 386 U.S. 17 (1967)	12,13
Davis vs. Alaska, 415 U.S. 308 (1974)	9
Douglas vs. Alabama, 380 U.S. 415 (1965)	4,8,9,13
Harrington vs. California, 395 U.S. 250 (1969)	13
Hill vs. State, 232 Ga. 800, 209 S.E.2d 575 (1958)	10
Jankovich vs. Indiana Toll Road Comm., 379 U.S. 487 (1965)	3
Lewis vs. U.S. 146 U.S. 370 (1892)	4
Neighbours vs. State, 121 Ohio St. 525 (1930)	7
Ohio vs. Roberts, 448 U.S. 56 (1980)	9,10
Pointer vs. Texas, 380 U.S. 400 (1965)	4
State vs. Marcoux, 101 N.H. 294, 140 A.2d 575 (1958)	10
Stembridge vs. Georgia, 343 U.S. 541 (1952)	3

CONSTITUTION

Sixth Amendment, U.S. Constitution	1,2,4,9,10

RULES PAGE

Rule 801 C, Ohio Rules of Evidence..... 11

Rule 802, Ohio Rules of Evidence..... 1,11

Rule 803, Ohio Rules of Evidence..... 11

Rule 804, Ohio Rules of Evidence..... 11

SECONDARY AUTHORITY

Note Confrontation, Cross-examination, and the Right to Prepare a Defense, 56 Geo. L.J. 939 (1968)..... 4

ARGUMENT IN OPPOSITION TO CERTIORARI

Petitioner, the State of Ohio, has filed a Petition for Writ of Certiorari to review the Ohio Supreme Court denial of review. Respondents were indicted, tried individually in separate counties, convicted and sentenced for aggravated robbery, kidnapping and aggravated murder. The Court of Appeals for Pickaway and Highland Counties, Fourth Appellate District, Ohio, reversed the convictions for kidnapping and aggravated murder. The Court of Appeals, in separate opinions for each Respondent, held that the trial court erred by admitting evidence at the individual trials of the Co-Defendant's extra-judicial statements. The Court of Appeals grounded its decision upon two bases: 1) The Defendants' constitutional right of confrontation was denied by admission of the extra-judicial statement of the Co-Defendant; 2) Inadmissible hearsay evidence was admitted at trial in violation of Rule 802, Ohio Rules of Evidence.

The State of Ohio filed a Motion to Certify the appeal to the Ohio Supreme Court. In its Memorandum in Support of Jurisdiction the State of Ohio addressed the hearsay issue exclusively. No argument was presented addressing the constitutional issues presented by the confrontation clause of the Sixth Amendment to the U.S. Constitution. The State of Ohio also raised for the first time in these Appellate proceedings the issue of harmless error. The Supreme Court of Ohio denied the Motions to certify the appeal.

Respondents respectfully submit this Supreme Court should deny the

Writ of Certiorari and set forth the following propositions of law:

I. Where a State Court decision can be sustained on the basis of state law independent of any federal question raised and passed upon in the case, the Supreme Court will either deny its jurisdiction to review or dismiss the case.

II. The failure of the Petitioner to adequately present and brief an issue before the Ohio Supreme Court waives the consideration of that issue before the U.S. Supreme Court upon a Writ of Certiorari.

III. The Sixth Amendment to the U.S. Constitution entitles the accused in all criminal prosecutions to be confronted by the witnesses against him and is violated by admission of the extra-judicial statements of another not testifying at the trial and not evidencing substantial indicia of trustworthiness.

IV. Where the prosecution's sole direct evidence contraverting the Defendant's testimony is an inadmissible extra-judicial statement of a Co-Defendant, the error cannot be deemed harmless as a matter of law.

I.

WHERE A STATE COURT DECISION CAN BE SUSTAINED ON THE BASIS OF STATE LAW INDEPENDENT OF ANY FEDERAL QUESTION RAISED AND PASSED UPON IN THE CASE, THE SUPREME COURT WILL EITHER DENY ITS JURISDICTION TO REVIEW OR DISMISS THE CASE.

In the Judgment reversing the convictions and ordering the cases be remanded for trial, the Court of Appeals rested the respective decisions upon two bases: 1) The Federal Constitutional violation of the confrontation clause; 2) The state evidenciary hearsay issue. On its appeal to the Supreme Court, the State of Ohio failed to address the Federal Constitutional issue. The Supreme Court of Ohio denied review. The reversals entered hereinbelow may be sustained upon adequate state evidenciary law independent of any Federal Constitutional questions. Where a decision of a state court can be sustained on a basis of state law independent of any federal question raised and passed upon in the case, the Supreme Court will either deny its jurisdiction to review or dismiss the case. Ashwand vs. TVA, 297 U.S. 238 (1936); Stembridge vs. Georgia, 343 U.S. 541 (1952); Jankovich vs. Indiana Toll Road Commission, 379 U.S. 487 (1965).

II.

THE FAILURE OF THE PETITIONER TO ADEQUATELY PRESENT AND BRIEF AN ISSUE BEFORE THE OHIO SUPREME COURT WAIVES THE CONSIDERATION OF THAT ISSUE BEFORE THE U.S. SUPREME COURT UPON A WRIT OF CERTIORARI.

Because the Federal Constitutional issue was not presented for review

before the Supreme Court of Ohio, Petitioner should not now be heard upon that issue. The Supreme Court of Ohio, having no opportunity to review, ought not have its decision disturbed.

III.

THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION ENTITLES THE ACCUSED IN ALL CRIMINAL PROSECUTIONS TO BE CONFRONTED BY THE WITNESSES AGAINST HIM AND IS VIOLATED BY ADMISSION OF THE EXTRA-JUDICIAL STATEMENTS OF ANOTHER NOT TESTIFYING AT THE TRIAL AND NOT EVIDENCING SUBSTANTIAL INDICIA OF TRUSTWORTHINESS.

Among the protections of the Sixth Amendment to the U.S. Constitution, it provides "that in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." This clause has been held to guarantee a number of rights, including the following: 1) The right of an accused to be present at every stage of his trial. Lewis vs. U.S., 146 U.S. 370 (1892); 2) The right to such information prior to trial as may be necessary to enable the ultimate confrontation at the trial to be meaningful. Note Confrontation, Cross-examination, and the Right to Prepare a Defense, 56 Geo. L.J. 939 (1968); 3) The personal presence of the witness at the trial, sworn and giving testimony under oath, enabling the trier to observe the demeanor of the witness in evaluating his credibility. Barbara vs. Page, 390 U.S. 719 (1968); 4) The opportunity for cross-examination. Pointer vs. Texas, 380 U.S. 400 (1965). "Indeed, the primary interest secured by [the confrontation clause] is the right of cross-examination..." Douglas vs. Alabama,

380 U.S. 415 (1965).

The issue decided by the Court of Appeals, hereinbelow, arose from the admission of a statement by the Co-Defendant which was made during interrogation following the arrest. A pretrial hearing was conducted upon Motion to exclude the statement of the Co-Defendant as being violative of the Sixth Amendment pursuant to the rational of Bruton vs. U.S., 391 U.S. 121 (1968). During the hearing, Sheriff Radcliff testified that he first obtained individual recorded statements from both Defendants. He then brought the two Defendants into a room together. Sheriff Radcliff then initiated a conversation between the two Defendants and Sheriff Radcliff. (Transcript of hearing p. 9, Appendix A1). At page 10 of the transcript of the hearing, (Appendix A2) Sheriff Radcliff testified as follows:

> ...Then I basically went over each statement, the crucial points in each statement, which did not coincide with, what each had told. That basically was, who, in fact, alighted from the car, who in fact was at the scene Duvall Road, and who in fact pulled the trigger. However, there was no discrepancy until such time, as those particular things arose, at which time each of the individuals still maintained their statement they had previously given. Mr. Counts indicated Mr. Adkins and Mr. Adkins has indicated Mr. Counts, and the confrontation, the statement ended, and Mr. Counts indicated to Mr. Adkins, no you are lying. They were returned back to their original incarceration floor..."

Further testimony by Detective Sergeant Phillip Brown demonstrates the lack of meaningful confrontation between the two Defendants. At page 20 of the transcript of the hearing, (Appendix A4) Detective Sergeant Phillip

Brown describes the "confrontation" as follows:

q. Were the Defendants given an opportunity to talk to each other at that time?

a. There was questions directed to each of the Defendants, Mr. Counts, along with Mr. Adkins, by Sheriff Radcliff, and they each answered each question as asked.

q. So Sheriff Radcliff directed the course of these conversations?

a. He asked the questions, and they each one answered.

q. Now, you have been in the Courtroom many times during the trial of criminal cases?

a. Yes, I have.

q. And you have observed attorneys' cross-examinations of witnesses, and cross-examinations of specifically Co-Defendants in criminal cases?

a. Yes, I have.

q. In comparison to the attorneys' cross-examination, in those cases, how would you care to characterize the cross-examination of the Defendants, Danny A. Counts and Willie E. Adkins at that meeting?

***

(Transcript of Hearing p. 21, Appendix A5)

q. Did they (Defendants) have an opportunity to question each other?

a. You mean the Defendants questioned each other, not to my knowledge, they didn't. The Sheriff was asking the questions. They each answered. He asked the other one the same questions, and he answered.

q. That was the end of it?

a. Basically.

In view of the lack of meaningful cross-examination during this meeting described as a "confrontation", Respondents submit that the extra-judicial statements of the Co-Defendant made during that "confrontation" should not have been utilized by the Prosecution at trial. Neighbours vs. State, 121 Ohio St. 525 (1930). The Defendants were merely placed in a room together and Sheriff Radcliff directed the questions to each of them. They had no opportunity to question each other. Respondents submit that the sole purpose of bringing the two Defendants together was the belief that the rules of evidence provided that their statements could be used at trial against them without having to present the Co-Defendant for cross-examination. Attention is directed to page 296 of the transcript of the trial. (Appendix A10) During the course of examination of Sheriff Dwight Radcliff, the following statements were made:

q. Now, you brought the two together for the confrontation, wasn't the purpose of doing that so that you could bring in Danny Counts' statement in the Trial against Willie Adkins, so that you wouldn't have to bring Danny Counts in to take the stand to testify for the jury to observe?

a. No, that's not correct.

q. That's the effect, isn't it? Because you have those statements, you can bring them in.

Mr. Kline: Your Honor, let him answer the question please.

The Court: He started to answer the question.

Mr. Carter: He said no.

Mr. Kline: No he didn't exactly say that.

The Court: Go ahead sheriff.

a. That is not the purpose of why this was done in full.

q. I'm sorry. What is it?

a. That's - investigative, --

q. That's -

a. That's investigative techniques a person has.

q. And those investigative techniques are developed based upon the Rules of Evidence in Court so that these statements can come in without the declarant taking the stand to observe them make the statements?

a. Yes.

Inasmuch as no meaningful cross-examination of the Co-Defendant was conducted, and in view of the fact that the purpose of bringing the two Defendants together was to create the guise of confrontation so that the statement could be used at trial without calling the Co-Defendant, Respondents submit those statements never should have been used at the trial.

> The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him"...
>
> ...Confrontation means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." Douglas vs. Alabama, 380 U..S. 415, 418 (1965). Professor Wigmore stated:
>
> > The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness or of being

> gazed upon by him, but for the purpose of cross-examination, which cannot be had except by direct and personal puting of questions and obtaining immediate answers."

Davis vs. Alaska, 415 U.S. 308, 315-316 (1974), quoting from Douglas vs. Alabama, 380 U.S. 415 (1965).

Douglas vs. Alabama, supra, involved improper admission of a Co- Defendant's statements at trial of the accused. The U.S. Supreme Court held the Sixth Amendment right to confrontation had been violated and reversed the Trial Court.

In the case of Ohio vs. Roberts, 448 U.S. 56 (1980), the U.S. Supreme Court stated the confrontation clause reflects a preference for face-to-face confrontation at trial, and a primary interest secured by the right of cross-examination. The absence of proper confrontation by an accused at trial, as guaranteed by the Sixth Amendment, calls into question the ultimate integrity of the fact finding process. The Supreme Court further held the confrontation clause establishes a rule of necessity requiring in the usual case, that the prosecution either produce or demonstrate unavailability of the declarant whose statement it wishes to use against the Defendant. In each case the Co-Defendant was incarcerated in Ohio at the time of trial and subject to subpoena. However, the Prosecutor chose simply to place the Co-Defendant's statement into evidence without subjecting it to rigorous cross-examination. Ohio vs. Roberts, supra, requires a good-faith effort to obtain the witness' presence at trial in order to claim the exception to the confrontation clause. The prosecution failed to demonstrate unavailability

of the Co-Defendant and therefore the first test of State vs. Roberts, supra, has not been satisfied.

The "investigatory techniques" employed by the Prosecution, in league with the Sheriff, constituted no more than an exercise of subterfuge intended to circumvent this Defendant's right to confront his accuser. Placing the two Defendants in an interrogation room, in the presence of the Prosecutor, an investigating detective, Sergeant deputy, a jailer and the Sheriff, and then having the Sheriff read their individual statements is in no wise conducive to full and adequate confrontation. The prosecution effectively placed before the jury the full statement of the Co-Defendant -- the only direct evidence fully implicating the Defendant and controverting his testimony. The prosecution was able to present this statement even though it was not given under oath. The jurors did not have the opportunity to observe the Co-Defendant, and his demeanor. The Co-Defendants' statements were never tested by an examiner on behalf of the Defendant. There is no indicia evidencing trustworthiness of the contested statement. Indeed, in view of the predilections of a Co-Defendant, any statements inculpating another must be suspect.

For additional authority, see Hill vs. State, 232 Ga. 800, 209 S.E. 2d 153 (1980) and State vs. Marcoux, 101 N.H. 294, 140 A.2d 575 (1958).

This Court must conclude that Respondents' Sixth Amendment Rights to confront witnesses were subverted. Additionally, the objectionable statements were inadmissible hearsay.

Rule 802, Ohio Rules of Evidence, states, with certain exceptions, that hearsay is not admissible. Rule 801 (C), Ohio Rules of Evidence, defines hearsay as follows:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Though Rule 801 goes on to exclude certain statements as hearsay, and Rules 803 and 804, Ohio Rules of Evidence, provide certain exceptions, none provide for admission of the subject statement. Indeed, the Petitioners have not claimed any such exception as authority for admission.

The Prosecution's sole motivation for placing the Co-Defendants statement into evidence was to implicate the Defendant as a murderer. Any other explanation for that evidence is tortured. Each Co-Defendant's statement contained the assertion that the Defendant was a murderer and the statement was used to prove that the Defendant was a murderer.

Petitioner discusses adoption and seems to argue that each Respondent adopted the Co-Defendant's statement. The Court of Appeals, hereinbelow, held as follows: "Such a rule (adoption) is wholly inappropriate as the record reflects without question that at the "confrontation" at the jail, Appellant disputed Counts' (Co-Defendant) version of the facts and adhered to his initial statement that Counts, not he, was the instigator of the kidnapping and murder." Petitioner's contention thoroughly confounds Respondents' comprehension. The Co-Defendant stated that the Defendant was

a murderer. The Defendant denied that he was a murderer. He could not possibly adopt a statement in direct contra-distinction to his position. Indeed each Defendant made statements which were admitted against them at trial. The only additional testimony contained within the "adopted statement" contradicted the Defendant's statement.

IV.

WHERE THE PROSECUTION'S SOLE DIRECT EVIDENCE CONTRAVERTING THE DEFENDANT'S TESTIMONY IS AN INADMISSIBLE EXTRA-JUDICIAL STATEMENT OF A CO-DEFENDANT, THE ERROR CANNOT BE DEEMED HARMLESS AS A MATTER OF LAW.

Petitioner correctly relies upon the holding of Chapman vs. California, 386 U.S. 17 (1967), for weighing the harm of demonstrated error. In the case at bar, each Defendant presented his testimony negating the Prosecution's circumstantial evidence of intent. Each Defendant testified that he intended to commit a robbery only, but the Co-Defendant acted far beyond the scope of the planned robbery and the Co-Defendant committed murder on his own initiative with no assistance by the testifying Defendant. The sole direct evidence controverting the Defendant's testimony was the inadmissible, extra-judicial statement of the Co-Defendant. When a claim of harmless error is raised the appellate Court must read the record and decide the probable impact of the error on the minds of the average juror. By applying the standard of Chapman vs. California, supra, to determine whether the error was harmless beyond a reasonable doubt or did it contribute

to the conviction, a reviewing Court will look at the trial strategy as a factor in assessing the probable impact on the average juror. Harrington vs. California, 395 U.S. 250 (1969).

The Court of Appeals held as follows:

> [G]iven the nature of the defense tendered by Appellant, the hearsay was a major piece of evidence, which, if accepted by the jury, totally negated and rendered worthless Appellant's version of the kidnapping and murder. Under such circumstances, we are not persuaded it may be considered harmless error under the Chapman standard.

Attnetion is also directed to the facts and holding of Douglas vs. Alabama, 380 U.S. 415 (1965).

CONCLUSION

IN VIEW OF ALL OF THE FOREGOING, this honorable Supreme Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

DUMM AND CARTER CO. LPA

By Stephen P. Carter

By Gary Dumm

Attorneys for Respondents
206 South Court Street, P.O. Box 211
Circleville, Ohio 43113
(614) 477-2538

the co-defendant, in to the room together.

A Yes.

Q For a series of statements that were unrecorded?

A Yes.

Q You initiated the conversation between the defendant, and the co-defendant?

A That is correct.

Q You initiated that conversation by advising them in their specific stories, that you had found inconsistencies, and discrepancies, in their statements?

A Well, I don't know just exactly - I know how I felt I did it.

Q Well, just describe that?

A First of all, I sought both their permissions, before I brought them together, at the orignation of this, with Mr. Counts denying very vividly that he was not the man who had pulled the trigger, in this particular case. Since we had gone and found the body, he wanted to face Mr. Adkins Having already talked to Mr. Adkins, and knowing what Mr. Adkins had told me, I then had Mr. Adkins brought, from his place of incarceration, in the Pickaway County Jail, and I talked to him briefly, at the base of the stairs, before we got in my office, where this conversation took place, betwe the two of them, and Mr. Adkins agreed to go in, however, he said there was going to be a problem, and I assumed he

thought there was going to be a physical problem to meet.

Q Now, what made you assume that?

A Just from what he said, there is going to be a problem, so I indicated to him, there would be no problem, not going to be any physical problem, or anything like that, not any fighting, or anything like an attack between he, and Counts. He agreed very vividly to go in with myself, the prosecutor was present, and so was Detective Brown. Mr. Counts, he was setting on a chair over to the left, and Mr. Adkins was in a chair to the right of my desk. I would be facing them. I introduced them to each other, asked in fact if they knew who that particular individual was. They both acknowledged who it was, by name, and so forth. Then I basically went over each statement, the crucial points in each statement, which did not coincide with, what each had told. That basica was, who, in fact, alighted from the car, who in fact was at the scene, on Duvall Road, and who in fact pulled the trigger. However, there was no discrepancy until such time, as those particular things arose, at which time each of the individuals still maintained their statement they had previously given. Mr. Counts indicated Mr. Adkins and Mr. Adkins indicated Mr. Counts, and the confrontation - the statement ended, and Mr. Counts indicated to Mr. Adkins, n you are lying. They were then returned back to their original incarceration floor, floor 1 and 2.

Q Was there anybody else present, in the room, at that point?

A The Prosecutor, Detective Brown, myself, the 2 defendant and possibly the jailer. However, I doubt that he would have been present. The room was small, no need for anyone else. I would say the jailer turned Mr. Adkins over to me, at the base of the steps. I probably escorted him the rest of the way, into the office.If I am not mistaken I probably took him out, and returned him.

Q When you were going through the discrepancies of the statements, did you also ask, who took the money out of the store, and who took the gentleman out of the store?

A I am sure I did because - I think it was said. The statements, we went over basically what was said. I am sure that we probably went over that.

Q Well, your saying you aren't sure, you don't have an absolute recollection?

A If my memory serves me correctly, that was a point of contention, of each saying the other did it, and I am sure we did go over that particular point.

Q Were there any other points, of contention?

A There was no point of contention, as far as any mode of travel, both agreed who the car belonged to, who was driving, and who the shotgun belonged to. There was some discrepancy on whose idea it was. There was no discrepancy

Q Now, Sgt. I will direct your attention to another set of conversations later that evening, the evening after the arrest. Where the defendant and co-defendant were brought in the room together, and there were certain conversations between them. Do you recall those conversations?

A Yes, I do.

Q Were the defendants, given an opportunity to talk, to each other, at that time?

A There was questions directed, to each of the defendants, Mr. Counts along, with Mr. Adkins, by Sheriff Radcliff, and they each answered each question as he asked it.

Q So, Sheriff Radcliff directed the course, of these conversations?

A He asked questions, and they each one answered.

Q Now, you have been in the court room many times, during the trial, of criminal cases?

A Yes, I have.

Q And you have observed attorneys' cross examination of witnesses, and cross examination of specifically co-defendants, in criminal cases?

A Yes, I have.

Q In comparison to the attorneys cross examination, in those cases, how would you characterize the cross examination of the defendants, Danny counts and Willie Adkins? at that meeting?

A There was no difference between Mr. Counts and Mr. Adkins.

Q I am sorry. I am not asking if there was a difference between Counts and Adkins, I am asking whether you felt there was adequate cross examination, for trial purposes, at that time?

THE COURT: You mean the questions Sheriff Radcliff asked each of these parties?

MR. CARTER: Right, getting into the confrontation between the defendants.

Q Did they have an opportunity to questions each other?

A You mean the defendants questioned each other, to my knowledge, they didn't. They sheriff was asking the questions. They each one answered. He asked the other one the same question, and then he answered.

Q That was the end of it?

A Basically.

Q Now, did you make any notes, or summaries of these conversations, or reports, concering the conversations?

THE COURT: Are you talking about the confrontation again?

MR. CARTER: Yes, your Honor.

A I think I made mental notes, which was later transcribed.

Q Did you review those, before you testified today, or at anytime?

threats, made to Mr. Adkins, so he would say one thing, or another?

A None whatsoever.

Q Did you, at anytime hear any lies told to Mr. Adkins, so he would say one thing, or another?

A No, I did not.

Q So, as far as you know the statement that he gave, from what you could see, was a voluntary statement. A decision he arrived at, on his own?

A Yes.

MR. KLINE: No other questions.

MR. CARTER: No questions. That is all I have your Honor.

And the said witness gave no other or further testimony.

MR. KLINE: Your Honor, at this time, we will call the defendant.

THE COURT: I don't think we can do that.

MR. KLINE: O.K. we rest, your Honor.

THE COURT: Now, we've got two motions here, to suppress two different statements that were made by the defendant. One of these related to a confrontation with the co-defendant. Now, as to the motion to suppress Mr. Adkins' recorded statement, of course, I think the testimony was, some of these various conversations were not recorded. I don't know of any authority that says it has to be recorded, to be

admitted into evidence. Now, as far as promises or encouragement, the very nature of the questioning, of a person suspected of a crime is, of course, in the nature of encouragement, to speak out as to what occurred in the matter. Now, I didn't hear anywhere there was any promise made to Mr. Adkins, that they would recommend a lesser charge, or something of that nature, to encourage him to talk in that way. Simply encouraged him to indicate what happened, since there was a man missing. So, it appears to the court, that the evidence here - - I didn't, of course, Mr. Adkins didn't testify, didn't have to testify, but I didn't hear anything in that regard that indicates there were promises made to the defendant, that were not later carried out. If there had been, of course, that would definitely effect the voluntarines of the statement. The court doesn't find that. As far as the motion, to suppress the individual statement of the defendant is concerned, the court finds too that statement was made voluntarily. He was advised of all his constitutional rights, and therefore that motion to suppress will be overruled. Now, the other motion that is directed to the confrontation betwee the defendants, apparently both of them made statements, both of them were indicating the other, as the one who had actuall shot the victim. So, they were brought in and questioned by Sheriff Radcliff. Now, I didn't hear anything that said they weren't given a full opportunity to speak up, or say what

they wanted to say. There was mention made here that it didn't comply with the rules of cross examination and all, but all of the evidence presented here in court indicates they had an opportunity to say what they wanted to say. Apparently their individual statements wasn't any different. Really at the confrontation they still maintained their statements they made individually. So, as far as Bruton is concerned, that is not well taken, because that was primarily whether an individual statement of one defendant could be used against the other defendant, when they were tried jointly. I don't find that in this case. The right to confrontation of a co-defendant, like this, is well established Since, they both apparently were - as indicated they did each have a part, in some of the events, that occurred earlier the previous evening, and it is not strictly a conspiracy case, I'll grant that. Not alleged like that in the indictment, and I don't believe that the other case indicates a conspiracy type, but it clearly was in the other case, and apparently in this case, the matter of aiding and abetting, which is a very serious issue, and the distinction between aiding and abetting and conspiracy is pretty close. Not the same, but pretty close. Anyway the court considering all the evidence presented here, as to the motion to suppress the confrontation statement, or all statements, the court finds that these motions are not well

taken, and they had been advised of their rights, and what occurred there in the confrontation was voluntary, and the court will overrule the motion to suppress the statement made by the co-defendant, at the confrontation.

AND THE ABOVE AND FOREGOING WAS ALL THE EVIDENCE AND TESTIMONY OFFERED IN THE TRIAL OF THIS CAUSE.

Q MR. CARTER NODDED HIS HEAD YES.

A I don't think that I left out anything in my prior testimony that was brought to my attention. I can only answer the questions, and I can return the answers to the best of my ability to the questions, and I don't think I left out anything. If --

Q Not on purpose.

A If I left out anything, I didn't intend to do it.

Q Okay. But it is possible you left out something?

A I don't recall.

Q Okay.

MR. CARTER: Excuse me, Your Honor, I'll have to go through my notes a second.

Q Now, when you brought the two together for the confrontation, wasn't the purpose of doing that so that you could bring in Danny Counts's statement in the trial against John Adkins, so that you wouldn't have to bring Danny Counts in to take the stand to testify for the jury to observe?

A No, that's not correct.

Q That's the effect, isn't it? Because you have those statements, you can bring them in.

MR. KLINE: Your Honor, let him answer the question please.

THE COURT: He started to answer the question.

MR. CARTER: He said no.

MR. KLINE: No, he didn't exactly say that.

THE COURT: Go ahead Sheriff.

A That's not the purpose of why this was done in full.

Q I'm sorry. What is it?

A That's not the purpose of why that was done in full.

Q In full, but it was part?

A That's investigative, --

Q That's --

A That's investigative techniques a person has.

Q And those investigative techniques are developed based upon the Rules of Evidence in Court so that these statements can come in without the declarant taking the stand to observe them make the statements?

A Yes.

Q The Prosecutor told you to make sure you got all those in your narration today, didn't he?

A The Prosecutor never told me anything.

Q You never discussed that with the Prosecutor, your testimony?

A We discussed our testimony, yes.

MR. CARTER: All right, thank you. That's all I have.